

Canon 3B(9) of the Code of Judicial Conduct

(9) Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending proceeding in any Massachusetts court, and shall require similar abstention on the part of court personnel.

(a) This section does not apply to any oral or written statement made by a judge in the course of his or her adjudicative duties.

(b) A judge is permitted to explain for public information the procedures of the court, general legal principles, or what may be learned from the public record in a case.

(c) A judge is permitted to speak, write, or teach about cases when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals and bar publications. This educational exemption does not apply, however, to comments or discussions that might interfere with a fair hearing of the case. A judge must confine any remarks concerning his or her own pending cases to statements permitted under Section (b).

(d) A judge is permitted to make public comment concerning his or her conduct provided that such comments do not reasonably call into question the judge's impartiality and do not address the merits of any pending or impending judicial decision.

(e) This section does not apply to proceedings in which a judge is a litigant in a personal capacity.

Commentary to Section 3B(9)

The section's restrictions on judicial speech are essential to the maintenance of the independence, impartiality, and integrity of the judiciary.

For purposes of this section, public comment is any oral or written statement about a case made by a judge other than statements made in the course of the judge's adjudicative duties. The requirement that a judge abstain from public comment regarding a pending proceeding continues during any appellate process and until final disposition. A case is impending for purposes of this section if it seems probable that a case will be filed, if charges are being investigated, or if someone has been

arrested although not yet charged. This rule does not require a judge to abstain from public comment about a Massachusetts proceeding that is not pending or impending.

"Any Massachusetts court" for purposes of this section means any state or federal court within the Commonwealth of Massachusetts.

Consistent with section (a), a judge may speak or write about a pending or impending case in the course of his or her adjudicative duties. A judge's oral statements from the bench during court proceedings and written orders or memoranda of decision filed in the case are made "in the course of his or her adjudicative duties."¹ Judges are encouraged to explain the basis for their decisions on the record. In some instances, such as decisions regarding bail, the use of prepared forms which become part of the public record may assist judges in this task. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings.

Section (b) permits the dissemination of public information to educate and inform the public, while assuring the public that cases are tried only in the judicial forum devoted to that purpose. A judge may explain to the media or general public the procedures of the court and general legal principles; for example, the procedures and standards governing a "dangerousness hearing" under G. L. c. 276, § 58A or restraining orders under G. L. c. 209A. A judge may also explain to the media or the general public what may be learned from the public record in a particular case. For example, a judge may respond to questions from a reporter about a judicial action that was taken and may correct an incorrect or incomplete media report by referring to matters that may be learned from the pleadings, documentary evidence, and proceedings held in open court. Section (b) permits similar responsive comments or explanations by a judge acting in accordance with administrative duties, including statements made by a judge who serves as part of a court department's judicial response team.

When teaching, speaking or writing about cases, as permitted under Section (c), a judge must take care that his or her comments do not impair public confidence in the impartiality of the judiciary. While a judge is permitted to teach, speak, or write

¹ For guidance as to a memorandum issued by a judge that provides or supplements an earlier order (an explanatory memorandum), see Supreme Judicial Court Guidance Regarding the Issuance of Explanatory Memoranda contained in Appendix A.

about pending cases in which he or she has personally participated, the judge must take particular care in such instances to confine the remarks to what is permitted under Section (b).

"Conduct" as used in subsection (d) refers to the manner in which a judge behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection (d).

Speaking to a journalist is a public comment even where it is agreed that the comments are "off the record."

The authorization to comment is permissive; there is no requirement that a judge respond to statements in the media or elsewhere. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond.